Ketua Pengarah Hasil Dalam Negeri v Yayasan Buah Pinggang Kebangsaan Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(IM)-672–09 OF 2022
NANTHA BALAN, MOHD NAZLAN AND CHOO KAH SING JJCA
1 APRIL 2024

Civil Procedure — Judicial review — Application for leave — High Court allowed respondent's application for leave to commence judicial review against appellant — Appellant revoked respondent's tax-exempt status and maintained decision after reconsideration — Whether respondent entitled to rely on appellant's later decision as 'impugned decision' although it was decision which was to reiterate and maintain appellant's earlier decision — Income Tax Act 1967 ss 44(6) & 145 — Rules of Court 2012 O 53 r 3

The respondent ie National Kidney Foundation ('NKF') was a charitable organisation that enjoyed tax-exempt status since the 1970s. The appellant ie Lembaga Hasil Dalam Negeri ('LHDN') conducted a tax audit on NKF and found non-compliance of the conditions of approval of tax exemption under s 44(6) of the Income Tax Act 1967 ('Act'). NKF provided LHDN with an explanation on the issue/findings raised by the LHDN. However, by a letter dated 29 August 2019 LHDN informed NKF that they had failed to comply with the conditions of the approval of the tax exemption and the tax exemption granted to NKF was revoked. After several exchanges of correspondences, LHDN via a letter dated 17 June 2020 informed NKF that their earlier decision per the letter dated 29 August 2019 was maintained and that NKF were subject to income tax under the Act. LHDN subsequently raised tax assessments on NKF. Dissatisfied, NKF applied for leave to commence judicial review and the High Court granted the application. Hence, this appeal. The issue for determination was whether, in view of the circumstances where NKF had implored upon LHDN to review/re-consider their earlier decision to revoke the tax-exempt status, NKF was entitled to rely on LHDN's decision per their letter dated 17 June 2020 as the 'impugned decision' for purposes of the judicial review, albeit that it was a decision by LHDN which was to reiterate and maintain their earlier decision per letter dated 29 August 2019.

Held, dismissing the appeal:

(1) LHDN's earlier decision could not be considered to be decisive as the decision maker LHDN had expressly, overtly or impliedly or by conduct, agreed to and did, reconsider or review the earlier decision. As such, for purposes of judicial review, time only started running from the later

decision, albeit, that it re-iterated or re-confirmed and maintained the earlier decision. There was a willingness on the part of LHDN to re-consider and they did re-consider and review the matter. It could not be said that LHDN's earlier decision dated 29 August 2019 was the impugned decision. The impugned decision for purposes of judicial review was the one which was conveyed via LHDN's letter dated 17 June 2020, albeit that it was a reiteration of LHDN's earlier decision dated 29 August 2019 revoking the tax-exempt status. Thus, the judicial review which was filed on 17 September 2020 was filed within three months as per O 53 r 3(6) of the Rules of Court 2012 ('the ROC') (see paras 33 & 37).

(2) There was no merit in the argument that the judicial review was filed out of time. There was no evidence as to when NKF actually received the impugned decision. Hence, pursuant to s 145 of the Act, it was deemed that the letter would have been delivered on the day after the date of the letter, viz. 18 June 2020. As per O 3 r 2 of the ROC, the 'time period' of three months 'begins to run from the next day', ie from 19 June 2020. Thus, the last date to file for judicial review was 18 September 2020. Here, the judicial review was filed on 17 September 2020, which was within the three months' time period under O 53 r 3 of the ROC (see paras 39, 42 & 45).

[Bahasa Malaysia summary

Responden iaitu Yayasan Buah Pinggang Kebangsaan ('NKF') adalah sebuah organisasi kebajikan yang menikmati status dikecualikan cukai sejak tahun 1970-an. Perayu iaitu Lembaga Hasil Dalam Negeri ('LHDN') menjalankan audit cukai ke atas NKF dan mendapati ketidakpatuhan syarat kelulusan pengecualian cukai di bawah s 44(6) Akta Cukai Pendapatan 1967 ('Akta'). NKF memberikan penjelasan kepada LHDN tentang isu/penemuan yang dibangkitkan oleh LHDN. Walau bagaimanapun, melalui surat bertarikh 29 Ogos 2019 LHDN memaklumkan NKF bahawa mereka gagal mematuhi syarat kelulusan pengecualian cukai dan pengecualian cukai yang diberikan kepada NKF telah dibatalkan. Selepas beberapa pertukaran surat-menyurat, LHDN melalui surat bertarikh 17 Jun 2020 memaklumkan NKF bahawa keputusan awal mereka mengikut surat bertarikh 29 Ogos 2019 dikekalkan dan NKF tertakluk kepada cukai pendapatan di bawah Akta. LHDN kemudiannya mengeluarkan taksiran cukai ke atas NKF. Tidak berpuas hati, NKF memohon kebenaran untuk memulakan semakan kehakiman dan Mahkamah Tinggi membenarkan permohonan itu. Oleh itu, rayuan ini. Isu untuk penentuan adalah sama ada, memandangkan keadaan di mana NKF telah memohon kepada LHDN untuk menyemak/menimbang semula keputusan awal mereka untuk membatalkan status dikecualikan cukai, NKF berhak untuk bergantung kepada keputusan LHDN mengikut surat mereka bertarikh 17 Jun 2020 sebagai 'keputusan yang dipersoalkan untuk tujuan

semakan kehakiman, walaupun ia adalah keputusan LHDN yang mengulangi dan mengekalkan keputusan awal mereka seperti surat bertarikh 29 Ogos 2019.

Diputuskan, menolak rayuan:

(1) Keputusan awal LHDN tidak boleh dianggap sebagai muktamad kerana pembuat keputusan LHDN telah secara nyata, terang-terangan atau tersirat atau melalui kelakuan, bersetuju dan melakukan, menimbang semula atau menyemak keputusan terdahulu. Oleh itu, untuk tujuan semakan kehakiman, masa hanya bermula dari keputusan kemudian, walaupun, ia mengulangi atau mengesahkan semula dan mengekalkan keputusan terdahulu. Terdapat kesediaan di pihak LHDN untuk mempertimbangkan semula dan mereka telah mempertimbangkan semula dan mengkaji semula perkara itu. Tidak boleh dikatakan bahawa keputusan awal LHDN bertarikh 29 Ogos 2019 adalah keputusan yang dipersoalkan. Keputusan yang dipersoalkan bagi tujuan semakan kehakiman adalah keputusan yang disampaikan melalui surat LHDN bertarikh 17 Jun 2020, walaupun ia mengulangi keputusan awal LHDN bertarikh 29 Ogos 2019 yang membatalkan status pengecualian cukai. Justeru, semakan kehakiman yang difailkan pada 17 September 2020 telah difailkan dalam tempoh tiga bulan seperti A 53 k 3(6) Kaedah-Kaedah Mahkamah 2012 ('KKM') (lihat perenggan 33 & 37).

(2) Tiada merit dalam hujahan bahawa semakan kehakiman difailkan di luar masa. Tiada keterangan tentang bila NKF benar-benar menerima keputusan yang dipersoalkan itu. Oleh itu, menurut s 145 Akta, adalah dianggap bahawa surat akan dihantar pada hari selepas tarikh surat itu, iaitu 18 Jun 2020. Mengikut A 3 k 2 KKM, 'tempoh masa' tiga bulan 'mula bermula dari hari berikutnya', iaitu dari 19 Jun 2020. Oleh itu, tarikh terakhir untuk memfailkan semakan kehakiman ialah 18 September 2020. Di sini, semakan kehakiman telah difailkan pada 17 September 2020, yang mana berada dalam tempoh masa tiga bulan di bawah A 53 k 3 KKM (lihat perenggan 39, 42 & 45).]

Cases referred to

Ah Seng Robin and another, Per v Housing and Development Board and another [2016] 1 SLR 1020, CA (folld)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54; [1983] CLJ Rep 266; [1983] 2 CLJ 7, FC (refd)

Migotti v Colvill (1878) 4 CPD 233, CA (folld)

Ravindran v Malaysian Examinations Council [1984] 1 MLJ 168; [1984] 1 CLJ Rep 320; [1984] 1 CLJ 232, FC (refd)

Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161; [2013] 3 MLRA 525; [2013] 4 CLJ

193; [2013] 4 AMR 211, FC (refd)

Legislation referred to

Income Tax Act 1967 ss 44(6), 145, 148(b)(ii), (b)(iii)
Rules of Court 2012 O 3 r 2, O 53, O 53 r 3(6), 3(7)

Appeal from: *Yayasan Buah Pinggang Kebangsaan Malaysia v Ketua Pengarah Hasil Dalam Negeri* [2022] MLJU 2967 (High Court, Shah Alam)

Ahmad Isyak Mohd Hassan (with Mohamad Ashyraf bin Zakaria) (Lembaga Hasil Dalam Negeri) for the appellant.
S Saravana Kumar (with Nur Hanina Mohd Azham) (Rosli Dahlan Saravana Partnership) for the respondent.

Nantha Balan JCA:

INTRODUCTION

[1] The Appellant is the Lembaga Hasil Dalam Negeri ('LHDN'). The Respondent is the Yayasan Buah Pinggang Kebangsaan Malaysia or the National Kidney Foundation of Malaysia ('NKF'). At all material times, NKF enjoyed 'tax-exempt' status pursuant to s 44(6) of the Income Tax Act 1967 ('the Act'). LHDN conducted a tax audit on NKF and then by letters dated 29 August 2019, they informed NKF of the violation of the conditions attached to the tax-exempt status and decided to revoke NKF's tax-exempt status. For convenience, we shall refer the LHDN's letters dated 29 August 2019 in the singular as letter dated 29 August 2019. NKF promptly made representations to LHDN and also to the Minister of Finance ('MOF') for a re-consideration and for the tax-exempt status to be maintained. NKF was then invited to give their input and were also asked to attend a meeting with LHDN to discuss the matter.

[2] Based on the events and the exchange of correspondence, it is fair to say that LHDN did review or reconsider the matter. We think that it is necessary and imperative that we should mention here that the conduct or stance of LHDN (as the tax authority) in entertaining NKF's plea for a re-consideration is laudable and is commendable as it contributes to good and effective governance and administration of the work done by a public authority.

[3] But, alas, the efforts by NKF to keep their tax-exempt status were not fruitful as LHDN could not be persuaded to change their stance on the tax-exempt status. LHDN then issued a letter dated 17 June 2020 where they stated that their decision to revoke NKF's tax-exempt status per their earlier letter dated 29 August 2019 is maintained. NKF then filed the judicial review

application on 17 September 2020. On 26 August 2022, the learned judge of the High Court granted leave for judicial review proceedings with no order as to costs.

THE ISSUE

[4] The issue at the heart of this appeal is whether, in view of the circumstances where NKF had implored upon LHDN to review/re-consider their earlier decision to revoke the tax-exempt status, NKF was entitled to rely on LHDN's decision per their letter dated 17 June 2020 as the 'impugned decision' for purposes of the judicial review, albeit that it was a decision by LHDN which was to reiterate and maintain their earlier decision per letter dated 29 August 2019.

[5] LHDN's position is that the impugned decision for purposes of judicial review is their decision per their letter dated 29 August 2019 and not the later decision per their letter dated 17 June 2020 which maintained the earlier decision to revoke the tax-exempt status.

[6] The reliefs sought in the judicial review are:

(a) An order for Certiorari to quash the LHDN's decision per the letter dated 17 June 2020 withdrawing NKF's tax exemption status under Section 44(6) of the Act on the grounds that the said Decision was illegal, void, unlawful and/or in excess of authority, had been irrational and/or unreasonable, and resulted in a denial of NKF's legitimate expectations;

(b) A Declaration that the LHDN is not entitled in law to impose arbitrary and unilateral conditions on a charitable organization such as NKF when such conditions are not contained in the approval letter and/or communicated to NKF; and

(c) A Declaration that NKF is a tax-exempt charitable organization pursuant to Section 44(6) of the Act.

[7] In so far as timelines are concerned, O 53 r 3(6) of the Rules of Court 2012 specifically states that a judicial review application must be filed within three months of the date of the decision. And if the application is 'out of time' then O 53 r 3(7) of the Rules of Court 2012 states that an extension of time must be sought. Order 53 r 3(6) and (7) read as follows:

(6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

(7) The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

A **[8]** In the present case, NKF filed the judicial review application on 17 September 2020. NKF did not make any application for extension of time. Hence, if, as LHDN contended, the impugned decision is their letter dated 29 August 2019, then the judicial review is doomed as the High Court lacked the jurisdiction to hear the application for judicial review.

B

[9] Indeed, it is trite that 'time' for purposes of judicial review goes to the court's jurisdiction. The principle in this regard was well-established by the earlier Federal Court cases, namely *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54; [1983] CLJ Rep 266; [1983] 2 CLJ 7 (FC), and *Ravindran v Malaysian Examinations Council* [1984] 1 MLJ 168; [1984] 1 CLJ Rep 320; [1984] 1 CLJ 232 (FC).

C

[10] More recently, in *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161; [2013] 3 MLRA 525; [2013] 4 CLJ 193; [2013] 4 AMR 211 (FC) the Federal Court had to consider the question whether when dealing with an application for extension of time, the court could consider the 'merits' of the judicial review application.

D

E

[11] In *Wong Kin Hoong*, Justice Raus Sharif (PCA) (as he then was) distilled the principles from the earlier Federal Court cases and held at [30]: '… the time frame in applying for judicial review prescribed by the Rules is fundamental. *It goes to jurisdiction* and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant'.

F

G

[12] In the present case, the judicial review was predicated on LHDN's decision which was communicated via letter dated 17 June 2020. The High Court took the view that the application for judicial review was made within the time period stipulated in O 53 of the Rules of Court 2012. Thus, if time is computed from LHDN's letter dated 29 August 2019, then the judicial review, filed on 17 September 2020 is woefully out of time.

H

[13] In so far as the appeal before us is concerned, we took the view that the impugned decision for purposes of the judicial review application is LHDN's decision which was communicated via letter dated 17 June 2020, albeit, that it was a decision by LHDN which was essentially to reiterate and maintain their earlier decision per letter dated 29 August 2019. LHDN also took the position that even if the LHDN letter dated 17 June 2020 is construed as the impugned decision, the judicial review is still out of time. We rejected LHDN's arguments as we were satisfied that the judicial review was well within the three-month

I

time period for the filing of the application. As such, we concluded that the appeal was devoid of merits and dismissed the appeal accordingly.

THE BACKGROUND

[14] NKF is a charitable organization. At all mattered times, or at least since the 1970s, NKF enjoyed tax-exempt status. In a letter, dated 20 June 1970, the tax authority wrote to NKF stating:

> The Chairman, 20hb. Jun, 1970
> Head of Manager,
> National Kidney Foundation of Malaysia,
> Messrs Ong, Teh, Chan & Co.,
> 1st and 2nd Floor, K.L. Ridges
> 64-A & B, Jalan Bukit Bintang,
> Kuala Lumpur.
>
> Tuan,
>
> National Kidney Foundation of Malaysia
>
> Further to my letter of the 20th May, I have pleasure in advising that the above Foundation has been approved for purposes of Section 44(6) (a) of the Income Tax Act, 1967 with effect from 8th December, 1969. All cash donations to the Foundation would therefore qualify for income tax relief to the donors as from that date.
>
> 2. The Notification of Approval will be published in the Federal Government Gazette shortly.
>
> Yang benar,
>
> (M. KUMARAPPAN)
> b.p. Pengawal Besar Hasil Dalam Negeri, Malaysia.

TAX AUDIT — 2019

[15] The tax-exempt status granted to NKF under sub-s 44(6) of the Act had been revoked as LHDN had found that there was (allegedly) non-compliance by NKF of the conditions of tax exemption granted. NKF's problem started when they received a letter dated 11 March 2019, from LHDN informing NKF that they would be carrying out an audit. The purpose of this audit was to ensure compliance with regards to NKF's Financial Statements which have

A been made pursuant to the Act and other Income Tax Rules. LHDN had also instructed NKF to prepare all the necessary documents for the purpose of the audit.

B **[16]** The audit was carried out on 8 April 2019. Pursuant to a letter dated 24 May 2019, LHDN informed NKF that they had found non-compliance of the conditions of approval of tax exemption under sub-s 44(6) of the Act. Pursuant to a letter dated 12 June 2019 NKF provided LHDN with an explanation on the issue/findings raised by the LHDN. By a letter dated 29 August 2019 LHDN informed NKF that they had failed to comply with the C conditions of the approval of the tax exemption under sub-s 44(6) of the Act and that LHDN had revoked the tax exemption granted to NKF as a result of the non-compliance.

D **[17]** After several other exchange of correspondences, LHDN via a letter dated 17 June 2020 informed NKF that their earlier decision per their letter dated 29 August 2019 was maintained and that they are subject to income tax under the Act and responsible for forwarding the 'Borang Nyata Cukai Pendapatan' to LHDN pursuant to ss 77 and 77A of the Act. Following the letter dated 17 June 2020, LHDN had pursuant to a letter dated 22 June 2020 E raised tax assessments for YA 2017 and 2018 on NKF. NKF was dissatisfied with the decision of LHDN and filed the application for leave to commence judicial review.

F **[18]** On 26 August 2022 the learned judge of the High Court granted leave for judicial review with no order as to costs. LHDN is aggrieved by the High Court's decision to grant leave for NKF to commence judicial review. Hence, this appeal.

G THE CORRESPONDENCE

[19] The first letter is dated 29 August 2019 from LHDN to NKF informing that they NKF had committed various violation of conditions. The said LHDN letter reads as follows:

H PENGERUSI

YAYASAN BUAH PINGGANG KEBANGSAAN MALAYSIA

NO 70, JALAN 14/29,

46100 PETALING JAYA

I SELANGOR.

Tuan,

YAYASAN BUAH PINGGANG KEBANGSAAN MALAYSIA (NKF) PENYELESAIAN AUDIT PEMATUHAN SYARAT KELULUSAN SUBSESKYEN 44(6) AKTA CUKAI PENDAPATAN 1967

Saya dengan hormatnya diarah merujuk kepada perkara di atas.

2. Sukacita dimaklumkan bahawa pihak Ketua Pengarah Hasil Dalam Negeri Malaysia (LHDNM) telah selesai menjalankan audit pematuhan di bawah subseksyen 44(6) Akta Cukal Pendapatan 1967 (ACP 1967) terhadap Institusi organisasi di atas.

3. Berdasarkan kepada maklumbalas yang dikemukakan oleh pihak tuan, KPHDNM berpendapat bahawa, Yayasan Buah Pinggang Kebangsaan Malaysia (NKF) gagal patuh terhadap syarat-syarat kelulusan di bawah subseksyen 44(6) ACP 1967. Kegagalan pematuhan adalah sepertimana di *Lampiran 1*.

4. Untuk makluman institusi/ organisasi, KPHDNM juga telah memperkenalkan dan menggunapakal Sistem Mata Kesalahan bagi menilai kesalahan yang telah dilakukan oleh Institusi organisasi. Sistem Mata Kesalahan adalah berasaskan kepada kesan impak kehilangan cukai.

5 Berdasarkan Sistem Mata Kesalahan di Lampiran 2, tindakan penyelesalan audit yang diputuskan adalah seperti berikut:

...

X : Kelulusan di bawah subseksyen 44(6) ACP 1967 bagi Institusi organisasi DITAMATKAN. *Sila rujuk surat penamatan kelulusan di bawah subseksyen 44(6) ACP 1967 sebagaimana dilampiran. Semua kesalahan akan direkodkan.*

...

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'BERSAMA MEMBANGUNKAN NEGARA'

Saya yang menjalankan amanah,

(YAACOB BIN OTHMAN)

Pengarah,

Bahagian Kelulusan Dan Pemantauan Jabatan Dasar Percukaian,

b.p Ketua Eksekutif/Ketua Pengarah Lembaga Hasil Dalam Negeri Malaysia.

Salinan Fail Induk/179-6.1506

[20] By a letter also dated 29 August 2019, LHDN revoked NKF's tax-exempt status. The second letter reads as follows:

29 AUG 2019

Pengerusi

Yayasan Buah Pinggang Kebangsaan Malaysia No 70, Jalan 14/29,

46100 Petaling Jaya, Selangor.

Tuan,

PEMAKLUMAN PENARIKAN BALIK KELULUSAN DI BAWAH SUBSEKSYEN 44(6) AKTA CUKAI PENDAPATAN 1967 (ACP 1967) BAGI YAYASAN BUAH PINGGANG KEBANGSAAN MALAYSIA (NKF)

Saya dengan hormatnya diarah merujuk kepada perkara diatas.

2. Berdasarkan kepada lawatan pematuhan yang dilaksanakan pada 08 April 2019 dan 09 April 2019 serta surat terakhir Lembaga Hasil Dalam Negeri Malaysia (LHDNM) bertarikh 24 Mei 2019 didapati terdapat perlanggaran syarat-syarat kelulusan di bawah subseksyen 44(6) Akta Cukai Pendapatan 1967 (ACP 1967):

(i) Resit Derma digunakan untuk pembelian aset & bersyarat

(ii) Kewujudan & fungsi dana-dana yang tidak jelas

(iii) Tiada Pengasingan akaun Derma

(iv) Pindaan Perlembagaan tanpa mendapat kebenaran

(v) Tiada makluman awal & kelulusan untuk pembukaan pusat dialisis & pembukaan cawangan (rakan kongsi)

(vi) Menjalankan perniagaan secara aktif (pusat dialisis)

(vii) Penerima manfaat bantuan minimal

(viii) Kemasukan duit yang banyak didalam 'Fixed Deposit'

(ix) Program Pembelajaran & Latihan -dActwarkan kepada orang luar

(x) Manfaat Belanja BerkaActn Pekerja yang sangat tinggi

(xi) Tiada pemakluman pembelian & pelupusan aset

3. Oleh yang demikian, kelulusan yang telah diberikan di bawah Subseksyen 44(6) ACP 1967 adalah dengan ini ditarik balik dengan kuasa di bawah peruntukan perenggan 148(b)(iii) ACP 1967 *berkuat kuasa mulai Tahun Taksiran 2017.*

4. Jesteru, Ketua Pengarah Hasil Dalam Negeri mempunyai kuasa sepertimana yang diperuntukkan di bawah Akta Cukai Pendapatan 1967 untuk membangkitkan taksiran ke atas pihak organisasi/institusi bagi tempoh atau tahun yang mana kelulusan di bawah Subseksyen 44(6) ACP 1967 ditarik balik.

5. Sehubungan itu, pengecualian pendapatan di bawah Jadual 6 yang terpakai secara automatik dengan kelulusan dibawah subseksyen 44(6) ACP 1967 adalah terbatal berkuatkuasa sebagaimana di perenggan 3 diatas.

6. Dengan itu, pihak Yayasan adalah tertakluk kepada cukai pendapatan dibawah Akta Cukai Pendapatan serta tanggungjawab terhadap pengemukaan Borang Nyata Cukai Pendapatan sebagaimana dibawah Seksyen 77/Seksyen 77A Akta Cukai Pendapatan 1967.

7. Yayasan tidak dibenarkan untuk menggunakan resit rasmi kelulusan bagi tujuan tolakan cukai kepada penderma dan sebarang resit yang dikeluarkan atas nama Yayasan selepas tarikh surat ini adalah tidak sah.

8. Terdapat banyak sekatan dibawah subseksyen 44(6) ACP 1967 dimana ini akan menyekat sebahagian perjalanan operasi NKF. NKF akan menghadapi kesukaran bagi memenuhi tuntutan perundangan bagi menjalani operasi pusat dialisis dengan tuntutan syarat-syarat dibawah subseksyen 44(6) ACP 1967.

8. Bagi meneruskan aktiviti kebajikan Yayasan, Yayasan boleh memohon untuk mewujudkan tabung kebajikan dan pendidikan yang lebih fokus dan menepati

hasrat kelulusan dibawah Subseksyen 44(6) ACP 1967. Kami juga mengucapkan terima kasih di atas kerjasama yang telah diberikan. A

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'BERSAMA MEMBANGUN NEGARA' B

Saya yang menjalankan amanah,

[YAACOB BIN OTHMAN]

Pengarah

Bahagian Kelulusan Dan Pemantauan Jabatan Dasar Percukaian C

b.p. Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri

Lembaga Hasil Dalam Negeri Malaysia

[21] Then NKF wrote to LHDN via letter dated 3 September 2019. The letter reads as follows: D

3 September 2019

Encik Yaacob bin Othman

Pengarah Bahagian Kelulusan dan Pemantauan E

Jabatan Dasar Percukalan

Lembaga Hasil Dalam Negeri

Menara Hasil Aras 17

Persiaran Rimba Permai F

Cyber 8, 63000 Cyberjaya

Tuan,

Per: Permakluman Penarikan Balik Kelulusan Di Bawah Subseksyen 44(6) Akta Cukai Pendapatan 1967 (ACP 1967) Bagi Yayasan Buah Pinggang Kebangsaan Malaysia (NKF) G

Saya merujuk kepada surat tuan LHDN.01/35/42/51/179-6.1506. Yayasan Buah Pinggang Kebangsaan Malaysia (YBPKM) dimana kelulusan yang telah diberikan di bawah Subseksyen 44(6) ACP1967 ditarik balik.

Bagi pihak YBPKM, saya ingin memohon penangguhan tarikh penarikan balik kelulusan pengecualian pendapatan seperti di dalam surat tuan. Ini adalah kerana YBPKM ada ramai penderma yang membuat pendermaan secara berterusan. Kami perlu masa sekurang-kurangnya sebulan untuk memberitahu mereka status terkini pendermaan mereka. H

YBPKM akur dengan nasihat dan arahan yang diberi oleh LHDN dan akan memohon untuk mengujudkan tabung Kebajikan dan Pendidikan seperti disaran dalam perenggan 8 surat tuan. I

Sekian. Terima Kasih.

Yang benar,

Dato' Dr. Zaki Morad bin Mohd Zaher

Pengerusi

Yayasan Buah Pinggang Kebangsaan Malaysia

[22] NKF's auditors, Messrs. Deloitte, also wrote to LHDN and made a presentation to explain the various issues which were highlighted in the tax audit. Deloitte's letter reads as follows:

Deloitte.

Ruj Tuan: LHDN 01/35/42/

Ruj Kami: Tax/LGP/AC/LMJ

24hb September 2019

Ibu Pejabat Lembaga Hasil Dalam Negeri Malaysia Jabatan

Dasar Percukalan

Menara Hasil Aras 17

Persiaran Rimba Permai Cyber

8, 63000 Cyberjaya Selangor

Darul Ehsan

U/P: Encik Yaacob bin Othman/Puan Anizah Ahad/Puan Astianty Chia

Tuan,

Yayasan Buah Pinggang Kebangsaan Malaysia ('NKF') Semakan Audit Cukai bagi Tahun Taksiran 2017

Dengan hormatnya kami merujuk kepada surat tuan bertarikh 29 Ogos 2019. Untuk menjelaskan hujah kami dengan lebih jelas and baik, kami meminta kebenaran Tuan untuk meneruskan surat ini dalam bahasa Inggeris.

Pertimbangan pihak Tuan dalam perkara ini didahului dengan ribuan terima kasih.

A. Overview of issues raised by Inland Revenue Board ('IRB')

1. We refer to the following:

8 and 9 April 2019	Field audit conducted by IRB
24 May 2019	IRB's tax audit finding letter (we note that there is no mention of violation point system in this letter)
14 June 2019	NKF's response to IRB's letter dated 24 May 2019
29 August 2019	(a) IRB's letter informing NKF that in accordance with the violation point system, NKF has breached 500 points ('Surat Penyelesaian Audit'). (b) IRB's letter informing NKF that its Section 44(6) approval has been withdrawn retrospectively from Year of Assessment ('YA') 2017 ('Surat Penarikan Kelulusan 44(6)'). These are attached as Appendix 1.

11 September 2019	Meeting between representatives from IRB, NKF and Deloitte Tax Services Sdn Bhd

2. We thank you for your time on 11 September 2019 and appreciate your kind consideration to allow NKF to present its response to IRB's letters dated 29 August 2019.

...

H. Supporting Documents

We enclose the following supporting documents for your review and consideration:

Appendix 1	IRB's letters dated 29 August 2019
Appendix 2	NKF's constitution as at 1997
Appendix 3	Extract of The Star Newspaper
Appendix 4	Summary of the requirements of operating a dialysis centre
Appendix 5	Malaysian Journal of Public Health Medicine 2018
Appendix 6-1	AFS
Appendix 6-2	P&L of each of NKF's departments
Appendix 6-3	P&L of each of NKF's dialysis centres
Appendix 7	Survey of salary by HR
Appendix 8	Survey of charges by private sector and other NGOs
Appendix 9	Fixed Assets Movement
Appendix 10	NKF's letter dated 16 November 2016 requesting for IRB approval in relation to its acquisition of real properties
Appendix 11	24th Report of the Malaysian Dialysis and Transplant Registry 2016

We look forward to your favourable reply.

We are ready to co-operate and assist with any further clarification that you may require.

Please feel free to contact Ms. Stefanie Low at +03 7610 8891/gelow@deloitte.com or Mr. Anston Cheah at +03 7610 8923/kcheah@deloitte.com.

Thank you.

Yours faithfully

Stefanie Low Geok Ping

Executive Director CC.

Y. Bhg. Dato' Dr. Zaki Morad Bin Mohd Zaher,

Mr Chua Hong Wee,

National Kidney Foundation of Malaysia

[23] Then NKF wrote a letter dated 10 October 2019 to LHDN, which reads:

Date: 18 October 2019

Headquarters Inland Revenue Board of Malaysia

A Tax Policy Department

Level 17, Hasil Tower Persiaran Rimba Permai Cyber 8, 63000 Cyberjaya

Selangor Darul Ehsan

Attn: Encik Yaacob bin Othman/Puan Anizah Ahad/Puan Astianty Chia

B Sirs,

National Kidney Foundation of Malaysia ('NKF' or 'the Foundation')

Tax Audit Year of Assessment 2017

We refer to the following:-

C (i) Our submission letter dated 24 September 2019 submitted to the Inland Revenue Board ('IRB') on the same date; and

(ii) Meeting held on 15 October 2019 between:

	Representatives
IRB	– Puan Anizah Ahad – Puan Astianty Chia
NKF	– Y. Bhg. Dato' Dr. Zaki Morad Bin Mohd Zaher – Mr Chua Hong Wee – Ms Lee Kim Geik
Deloitte Tax Services Sdn Bhd	– Ms Stefanie Low – Encik Abdullah Khairi – Mr Anston Cheah – Mr Jason Lee

F On Behalf of NKF's Board of Directors, we would like to express our sincere gratitude and appreciation to the IRB for allowing us an opportunity to present our case and address the IRB's concerns via our submission letter dated 24 September 2019 and also in the recent meeting held on 16 October 2019.

A. NKF's request

G As discussed during the recent meeting, we humbly request the IRB to:-

– *Re-evaluate the violation points* ('Sistem Mata Kesalahan') allocated to NKF via IRB's letter dated 29 August 2019 and *reinstate NKF's tax exempt status* under section 44(6) of the Income Tax Act 1967 ('the Act').

H *Re-evaluate the violation points and reinstate NKF's tax exempt status*

1. We trust the explanation provided in our submission letter dated 24 September 2019, (including our discussion with the IRB on 16 October 2019) has alleviated the IRB's concerns pertaining so the loss of tax revenue.

I 2. As for the compliance with certain administrative requirements, IRB would appreciate that there were ambiguities involved in some of these administrative aspects which were also highlighted to the IRB during the meeting on 16 October 2019. NKF has already taken proactive steps to adhere to IRB's requirements.

3. Accordingly, the violation points allocated to NKF via the IRB's letter dated 29 August 2019 should be re-evaluated and based on our assessment, these could possibly be *reduced to less than 101 points* which would only warrant a Reminder Letter instead of a revocation of NKF'S tax exempt status provided under Section 44(6) of the Act.

4. Consequently, we seek a reinstatement of NKF's tax exempt status under Section 44(6) of the Act.

C. Impact of withdrawal of NKF's tax exempt status under Section 44(6) of the Act

1. Reputation concern

– Since the release of NKF's media statement to the public on 4 September 2019 (which is a necessity for good corporate governance as NKF is dealing with public donations), NKF Is aggrieved that there could have been an adverse impact on its reputation as the public may mistakenly view that NKF has engaged in malpractice which leads to the Section 44(6) revocation.

– We wish to emphasise that NKF has built its solid reputation since 1969 as a non-profit charity organisation which was founded to aid/assist needy patients with kidney failure or suffering from kidney-related diseases and takes pride in defending this reputation.

– As an NGO which relies on public donations to support the Foundation's objectives, an impeccable reputation is extremely Important as it not only affects NKF but also the board of governors/directors who are all dedicated individuals serving the Foundation on pro bono basis.

2. We wish to take this opportunity to inform the IRB on the following:

...

3. Based on the above (taking into account our comments in *Part B* above), we humbly request the IRB to *reinstate NKF's tax exempt status under Section 44(6) of the Act on an urgent basis* so that NKF can resume Its charitable activities smoothly and continue to work with its stakeholders (Including the government agencies such as Ministry of Health, Social Security Organisation (SOCSO) and Public Services Department (PSD/JPA)) to carry out the Foundation's mission operate subsidised dialysis centres, providing education, research and advocacy on all matters relating to kidney health and responding through engagement, support and sustainable quality kidney treatment for those deserving kidney patients.

Conclusion

1. As NKF is an NGO which primarily rely on public donations, we would urge the IRB to *reinstate* NKF's tax exempt status under Section 44(6) of the Act from 29 August 2019, as though the tax exempt status has never been revoked.

We look forward to your favourable reply.

We are ready to co-operate and assist with any further clarification that you may require.

Thank you. Yours faithfully

Y. Bhg. Dato' Dr. Zaki Morad Bin Mohd Zaher

Chairman

A National Kidney Foundation of Malaysia

cc. Deloitte Tax Services Sdn Bhd

[24] LHDN then issued a response via letter dated 25 November 2019 B which reads:

25/11/2019

PENGERUSI

YAYASAN BUAH PINGGANG KEBANGSAAN MALAYSIA (NKF)

C NO 70, JALAN 14/29,

46100 PETALING JAYA, SELANGOR.

Tuan,

NATIONAL KIDNEY FOUNDATION OF MALAYSIA ('NKF' OR 'THE FOUNDATION') TAX AUDIT-YEAR OF ASSESSMENT 2017 D

Saya dengan hormatnya diarah merujuk surat tuan bertarikh 24 September 2019 dan 18 Oktober 2019.

2. Adalah dimaklumkan, rayuan supaya dikekalkan kelulusan di bawah subseksyen 44(6) Akta Cukai Pendapatan 1967 ke atas NKF *adalah masih sama seperti yang* E *telah diputuskan di dalam surat* Lembaga Hasil Dalam Negeri (LHDNM) *bertarikh 29 Ogos 2019*.

3. Sehubungan itu, satu permohonan kelulusan baru hendaklah dikemukakan untuk pertimbangan selanjutnya oleh LHDNM. Berdasarkan semakan pematuhan yang dijalankan, adalah dicadangkan kepada NKF untuk memohon kelulusan ke F atas *tabung kebajikan dan pendidikan NKF* bagi kerja-kerja kebajikan yang dijalankan.

4. Akaun berasingan hendaklah disediakan untuk tabung kebajikan dan pendidikan NKF, NKF dan Pusat Latihan Kejururawatan. Keputusan rayuan juga akan dikemukakan ke cawangan LHDNM yang mengendalikan fail persatuan G untuk tindakan yang berkaitan.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'BERSAMA MEMBANGUN NEGARA'

H Saya yang menjalankan amanah,

[YAACOB BIN OTHMAN]

Bahagian Kelulusan Dan Pemantauan

Jabatan Dasar Percukaian

I b.p. Ketua Pegawal Eksekutif/Ketua Pengarah Hasil Dalam Negeri

Lembaga Hasil Dalam Negeri Malaysia

[25] By letter dated 23 December 2019, NKF's wrote to the Minister of Finance ('MOF'). The letter sought the MOF's intervention and reads as

follows:

23 Disember 2019

Yang Berhormat Tuan Lim Guan Eng, Menteri Kewangan

Menteri Kewangan Kementerian Kewangan Malaysia Kompleks Kementerian Kewangan

No. 5, Persiaran Perdana, Presint 2

Pusat Pentadbiran Kerajaan Persekutuan 62592 Putrajaya Yang Berhormat,

Yayasan Buah Pinggang Kebangsaan Malaysia ('NKF' atau 'the Foundation') Pengembalian Semula Status Pengecualian Cukai (NKF) di bawah Seksyen 44(6), Akta Cukai Pendapatan 1967 [Reinstatement of NKF's Tax Exempt Status under section 44(6) of the Income Tax Act 1967 ('the Act'))

Kami ingin meminta keizinan tuan untuk meneruskan surat ini dalam Bahasa Inggeris.

We refer to the Inland Revenue Board ('IRB')'s letter dated 25 November 2019 (received by us on 6 December 2019) [annexed as *Appendix 1*].

We also refer to the following:-

No.	Description	Remarks
1.	Submission letter to the IRB dated 24 September 2019 submitted by our tax consultant, Deloitte Tax Services Sdn Bhd ('Deloitte').	Annexed as Appendix 2
2.	NKF's submission letter to the IRB dated 18 October 2019.	Annexed as Appendix 3
3.	Numerous discussions and meetings between NKF/Deloitte and the IRB from time to time.	

On behalf of NKF's Board of Directors, we are surprised and aggrieved by the IRB's decision of not reinstating our tax-exempt status under Section 44(6) of the Act despite our various submissions and explanations provided to the IRB in addressing its concern.

In this connection, *we humbly request the Ministry of Finance ('MOF') to reconsider our case* taking into account the following:

1. Our submission letter dated 24 September 2019

– Addressing and alleviating IRB's concerns pertaining to the loss of tax revenue.

– Ambiguities involved in certain administrative requirements imposed by the IRB.

– Accordingly, the violation points allocated to NKF should be re-evaluated and based on our assessment, these could possibly be *reduced to less than 101 points* which *would only warrant a Reminder Letter instead of a revocation of NKF's tax exempt status* provided under Section 44(6) of the Act.

2. Our submission letter dated 18 October 2019

– Impact of the withdrawal of NKF's tax exempt status, le reputation concern as

A the public may mistakenly view that NKF has engaged in malpractice which leads to the Section 44(6) revocation.

– NKF has built its solid reputation since 1969 as a non-profit charity organisation which was founded to aid/assist needy patients with kidney failure or suffering from kidney-related diseases and takes pride in defending its reputation.

B

– As an NGO which relies on public donations to support the Foundation's objectives, an Impeccable reputation is extremely important as it not only affects NKF but also the board of governors/directors who are all dedicated individuals serving the Foundation on pro bono basis.

C

– NKF's good governance was also recognised by the Registry of Society Malaysia (Jabatan Pendaftaran Pertubuhan Malaysia) for its code of good governance for the year 2019 (Penilaian Kod Tadbir Urus Baik Pertubuhan) (a copy of the award presented to NKF by YB Tan Sri Dato' Haji Muhyiddin bin Haji Mohd Yassin, Minister of Home Affairs is enclosed in this letter for your reference annexed as Appendix 4].

D

– Other contributions by NKF to the nation, e.g. flood relief aids to Kota Bharu town.

NKF's request

E

As NKF is an NGO which primarily rely on public donations, we humbly request the MOF to *reinstate NKF's tax exempt status under Section 44(6) of the Act on an urgent basis* so that NKF can resume its charitable activities smoothly and continue to work with its stakeholders (including the government agencies such as Ministry of Health, Social Security Organisation (SOCSO) and Public Services Department (PSD/JPA)) to carry out the Foundation's mission operate subsidised dialysis centres, providing education, research and advocacy on all matters relating to kidney health and responding through engagement, support and sustainable quality kidney treatment for those deserving kidney patients.

F

We look forward to your favourable reply.

G

We are ready to co-operate and assist with any further clarification that you may require.

Thank you.

Yours faithfully

H

Y. Bhg. Dato' Dr. Zaki Morad Bin Mohd Zaher

Chairman

National Kidney Foundation of Malaysia

I

[26] MOF acted on NKF's letter dated 23 December 2019 and sent a letter dated 6 January 2020 to the Chief Executive Officer ('CEO') of LHDN. By the said letter, MOF had enclosed NKF's appeal letter for the CEO's attention and action (*perhatian dan tindakan*):

MOF.MK.100-21/2/6Jld.3(22)

6 Januari 2020

YBHG. DATO' SRI SABIN BIN SAMACTH

Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri

Lembaga Hasil Dalam Negeri Malaysia

Ibu Pejabat Lembaga Hasil Dalam Negeri Malaysia,

Menara Hasil, Persiaran Rimba Permai, Cyber 8,

63000 Cyberjaya.

SELANGOR

YBhg. Dato' Sri,

PENGEMBALIAN SEMULA STATUS PENGECUALIAN CUKAI (NKF) DI BAWAH SEKSYEN 44(6), AKTA CUKAI PENDAPATAN 1967

Dengan segala hormatnya saya merujuk kepada perkara di atas dan surat daripada Yayasan Buah Pinggang Kebangsaan Malaysia bertarikh 23 Disember 2019 adalah berkaitan.

2. Bersama-sama dipanjangkan surat tersebut berserta minit daripada YB. Menteri berhubung perkara seperti di atas untuk *perhatian dan tindakan* pihak YBhg. Dato' Sri jua.

3. Kerjasama dan perhatian pihak YBhg. Dato' Sri dalam menguruskan perkara ini amatlah dihargai dan diucapkan terima kasih.

Sekian.

Saya yang menjalankan amanah,

(FARIDA-HANI M. YACOB)

Setiausaha Sulit Kanan kepada YB Menteri Kewangan Malaysia

[27] In the meanwhile, by a letter dated 24 December 2019, LHDN asked NKF to give a response to the audit findings. The letter reads:

Tarikh: 24/12/2019

PENGERUSI

NATIONAL KIDNEY FOUNDATION OF MALAYSIA

NO. 70, JALAN 14/29,

46100 PETALING JAYA,

SELANGOR.

Ybhg Dato'/Datuk/Datin/ Tuan/Puan,

NATIONAL KIDNEY FOUNDATION OF MALAYSIA (NKF) PENEMUAN SEMAKAN KES BAGI TAHUN TAKSIRAN 2017 DAN 2018

Saya dengan hormatnya merujuk kepada perkara di atas.

2. Untuk makluman, hasil pemeriksaan dan penyemakan rekod-rekod NKF bersama Jabatan Dasar Percukaian bagi tahun berakhir 31/12/2017 dan surat Jabatan Dasar Percukaian bertarikh 29/08/2019 dan 25/11/2019 dirujuk.

3. Berhubung dengan perkara tersebut, *tuan adalah dimohon untuk memberi maklum balas ke atas penemuan semakan* yang berkaitan dalam tempoh *18 hari* dari tarikh surat ini atau hadir ke pejabat ini *untuk perbincangan*.

4. Sila ambil maklum bahawa sekiranya tiada maklum balas diterima dalam tempoh, tuan adalah dianggap telah bersetuju dengan penemuan tersebut. Notis Taksiran serta pengenaan penalti di bawah peruntukan subseksyen 112 (3) dan/atau 113 (2) Akta Cukai Pendapatan 1967 akan dikeluarkan.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'BERSAMA MEMBANGUN NEGARA'

Saya yang menjalankan amanah,

(SYAIFUL AMNAR BIN AHMAD)

Unit Audit Luar Syarikat Cawangan

Petaling Jaya

Lembaga Hasil Dalam Negeri Malaysia

[28] By letter dated 17 January 2020, Deloitte wrote to LHDN and gave their response on behalf of NKF. Deloitte's letter reads as follows:

Deloitte

Your reference: (AL)/F0078492507/SAA

Our reference : Tax/LGP/AC/LMJ

17 January 2020

Lembaga Hasil Dalam Negeri Malaysia Cawangan

Petaling Jaya

Tingkat 15, Menara Hasil

PJ Trade Centre No. 8, Jalan PJU 8/8A

Bandar Damansara Perdana

47820 Petaling Jaya Selangor

Darul Ehsan

Attn: Encik Syaiful Ammar bin Ahmad

Sirs,

National Kidney Foundation of Malaysia ('NKF' or 'the Foundation') Years of Assessment ('YAs') 2017 and 2018

We refer to the following:-

1. Our letter dated 24 September 2019 (annexed as Appendix 1);

2. NKF's letters dated 18 October 2019 to Inland Revenue Board ('IRB'), Policy Branch ('IRB Policy') (annexed as Appendix 2) and 23 December 2019 to Ministry of Finance ('MOF') (annexed as Appendix 3);

3. IRB, Petaling Jaya Branch ('IRB PJ')'s letter dated 24 December 2019 (annexed as Appendix 4);

4. IRB PJ's letter dated 8 January 2020 allowing an extension of time till 17 January 2020 (annexed as Appendix 5);

5. *Meetings held between the IRB, NKF and Deloitte Tax Services Sdn Bhd ('Deloitte') from time to time*; and

6. *The recent telephone conversations between your representative [Encik Syaiful Ammar] and Deloitte [Mr Anston Cheah and Mr Jason Lee].*

A. Issue in dispute

Based on IRB's letter dated 24 December 2019 and the discussions held with IRB P), we understand that the *key issue* in dispute is whether the donations received by NKF (ie excess funds reported in NKF's audited financial statements) are 'income' and consequently, subject to tax under Section 4(a) of the Income Tax Act 1967 ('the Act') as business sourced income.

B. NKF's position

On behalf of NKF, we would inform that NKF is of the view that the donations received do not constitute 'income' and consequently, would not be subject to tax under Section 4(a) of the Act.

C. Background

At the onset, we would reiterate that NKF is a charitable organisation registered under the Societies Act, 1966 and is known to the general public as a *non-profit charity organisation which was founded to aid/assist needy patients with kidney failure or suffering from kidney-related diseases.*

NKF works with government agencies such as the Ministry of Health ('MOH'), Social Security Organisation (SOCSO) and Public Services Department (PSD/JPA)) (collectively the 'Agencies') to carry out its mission which is to operate subsidised dialysis centres, providing education, research and advocacy on all matters relating to kidney health and responding through engagement, support and sustainable quality kidney treatment for those deserving kidney patients.

D. NKF's submission

1. As stated in B above, NKF is of the view that the donations received do not constitute 'income' and consequently, would not be subject to tax under Section 4(a) of the Act.

F. Possible Resolution

As highlighted above, NKF has submitted a further appeal to MOF with regards to its tax exempt status.

Subject to the outcome of NKF's appeal to MOF, NKF Is contemplating, ON A WITHOUT PREJUDICE BASIS:

(a) the possibility of only subjecting the Interest income received by NKF In YA 2017 and YA 2018 to tax (please see Appendix A) and to consider granting a reduced penalty of 25% (as opposed to Imposing a 45% penalty); and

(b) In the event that MOF agrees to reinstate NKF's tax exempt status under Section 44(6) of the Act, the IRB will Issue Notices of Reduced Assessment ('Forms JR') for YAs 2017 and 2018 to discharge the assessment raised in respect of (a).

We are always ready to co-operate and assist with further questions. In the event that the IRB requires further clarification or have any other enquiries, we would be happy to schedule a meeting with the IRB to address any of your concerns.

[29] By letter dated 17 June 2020, LHDN wrote to NKF and stated that the earlier decision (per LHDN letter dated 29 August 2019) stands and their tax-exempt status is revoked. The letter reads:

Tarikh: 17.6.2020

PENGERUSI

YAYASAN BUAH PINGGANG KEBANGSAAN MALAYSIA (NKF)

NO 70, JALAN 14/29,

46100 PETALING JAYA,

SELANGOR.

Tuan,

PEMAKLUMAN RAYUAN PENGEMBALIAN SEMULA STATUS PENGECUALIAN CUKAI (NKF) DI BAWAH SUBSEKSYEN 44(6), AKTA CUKAI PENDAPATAN 1967

Saya dengan hormatnya diarah merujuk kepada perkara di atas, surat bertarikh 06 Januari 2020 dan perjumpaan pada 12 Februarl 2020.

2. *Adalah dimaklumkan, rayuan pengembalian semula status pengecualian cukai kelulusan di bawah subseksyen 44(6) ACP 1967 adalah dikekalkan seperti surat LHDNM bertarikh 29 Ogos 2019 dan 25 November 2019.*

3. Dengan itu, pihak Yayasan Buah Pinggang Kebangsaan Malaysia adalah tertakluk kepada cukai pendapatan dibawah Akta Cukai Pendapatan (ACP) 1967 serta tanggungjawab terhadap pengemukaan Borang Nyata Cukai Pendapatan sebagaimana dibawah Seksyen 77/ Seksyen 77A Akta Cukai Pendapatan 1967.

4. Yayasan Buah Pinggang Kebangsaan Malaysia tidak dibenarkan untuk menggunakan resit rasmi kelulusan bagi tujuan tolakan cukai kepada penderma dan sebarang resit yang dikeluarkan atas nama Yayasan Buah Pinggang Kebangsaan Malaysia adalah tidak sah mulai 29 Ogos 2019.

5. Satu permohonan baharu boleh dibuat kepada Ketua Pengarah Hasil Dalam Negeri untuk kelulusan di bawah subseksyen 44(6) ACP 1967 bagi kerja-kerja kebajikan yang dijalankan.

6. Kami mengucapkan terima kasih di atas kerjasama yang telah diberikan.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'BERSAMA MEMBANGUN NEGARA'

Saya yang menjalankan amanah,
[SALAMATUNNAJAN BINTI BESAH]
Pengarah Jabatan Dasar Percukaian
b.p. Ketua Pegawai Eksekutif/Ketua Pengarah Hasil Dalam Negeri
Lembaga Hasil Dalam Negeri Malaysia

THE APPEAL — OUR DECISION

[30] At the outset of the appeal, the learned revenue counsel informed us that he was confining his appeal on the sole ground that the High Court had erred in granting leave as the High Court lacked the requisite 'jurisdiction' to hear and allow the leave that was sought as the application for judicial review was filed 'out of time' ie more than three months from the date of the impugned decision. The learned revenue counsel's first line of argument was that, time for purposes of O 53 r 3(6) of the Rules of Court 2012, is to be computed from 29 August 2019 being the date of LHDN's letter to NKF informing that the tax-exempt status had been revoked. Next, it was also argued that at any rate, time is to be computed from 3 September 2019, which is the date of NKF's letter by which they (NKF) acknowledged that their tax-exempt status had been revoked. Finally, it was argued that even if time were to run from 17 June 2020, the judicial review application was out of time.

[31] At first blush, LHDN's proposition that time should be computed from the date of their letter dated 29 August 2019 or NKF's letter dated 3 September 2019 (which acknowledged LHDN's decision via letter dated 29 August 2019) appears attractive. Hence, if we accepted LHDN's argument, then clearly the judicial review which was filed on 17 September 2020 is out of time ie well beyond three months and leave ought to have been dismissed as time goes to 'jurisdiction'.

[32] But here, it is quite clear from the matrix of facts that although LHDN decided to revoke the tax exemption status per letter dated 29 August 2019, albeit wrongly relying on s 148(b)(iii) of the Income Tax Act 1967 (*when it should be* s 148(b)(ii) of the Act) — they nevertheless conducted themselves in such a manner as to demonstrate quite unequivocally that they were willing to, and did reconsider or review their earlier decision. Hence, LHDN's letter dated 24 December 2019 to NKF requesting for further information/input and thereafter, the meeting on 12 February 2020.

[33] In our view, the circumstances here are such that LHDN's earlier decision cannot be considered to be decisive as the decision maker LHDN had expressly, overtly or impliedly or by conduct, agreed to and did, reconsider or review the earlier decision. As such, for purposes of judicial review, time only

started running from the later decision, albeit, that it re-iterated or re-confirmed and maintained the earlier decision. The position we take is that where the public authority's conduct indicated a willingness to reconsider its earlier decision, then time runs from the later decision.

[34] In this regard, we agree with and endorse the principle which was enunciated by the Singapore Court of Appeal in the case of *Per Ah Seng Robin and another v Housing and Development Board and another* [2016] 1 SLR 1020 at paras [51] and [52]. These paragraphs from the Singapore Court of Appeal's judgment are instructive and read relevantly as follows:

> [51] For the purposes of calculating the three-month period stipulated in O 53 r 1(6), time generally starts to run from the date of the decision sought to be impugned (see *Teng Fuh Holdings* at [16]-[17]), or, where the decision is borne out of a multiple-step decision process, from the date of the final step in that process (see *Chiu Teng* at [36]).
>
> But, this is not an inflexible or unyielding rule. *Time may start to run later w here the r espondent's conduct indicates a willingness to reconsider its earlier decision*, and in cases where there is delay, it is always open to the applicant to attempt to persuade the court that it has a satisfactory explanation for the delay. (However, as we mentioned earlier at [46] above, it *may* be that the delay exception does not apply where the applicable time limit is prescribed by written law, as opposed to the three-month period stipulated in O 53 r 1(6).)
>
> [52] In UDL *Marine*, a decision which the appellants rely on, the court permitted time to start running later on the ground that the respondent's *conduct* indicated a willingness to reconsider its earlier decision. The respondent in that case, Jurong Town Corporation ('JTC'), leased land to UDL Marine (Singapore) Pte Ltd ('UDL'). UDL applied to renew the lease, but was turned down. JTC, which informed UDL of this by way of a letter dated 20 November 2009, said that its decision was 'final'. Later, JTC wrote to UDL informing it that the Economic Development Board and itself (JTC) would jointly review UDL's business plans and give their joint assessment in due course. On 19 May 2010, JTC wrote to UDL informing it that the joint assessment had been concluded and did not support the renewal of the lease. UDL then applied to the High Court for leave to seek (inter alia) a quashing order in respect of JTC's decision. *In deciding whether the three-month period stipulated in O 53 r 1(6) had been breached, Lai J held that time started to run from JTC's later rejection letter of 19 May 2010 instead of from the first rejection letter of 20 November 2009 — this was because even though JTC indicated in its first rejection letter that its decision was 'final', its later conduct was a clear indication that it was open to reconsidering its decision.* (Emphasis added.)

[35] As we observed at the outset, what happened here can fairly be described as a reconsideration or review, by LHDN and a subsequent reiteration or reconfirmation of its earlier decision to revoke NKF's tax-exempt status. The review or reconsideration was undertaken upon the request of NKF who had sent various letters on their own, and through their tax advisers (Deloitte) to

LHDN seeking for a 're-valuation' of the violation points and for the tax-exempt status to be reinstated, and a separate letter dated 23 December 2019 to the MOF.

[36] It is necessary to mention here that in their letter to the MOF, NKF specifically stated, '... we humbly request the Ministry of Finance ('MOF') *to reconsider our case* taking into account the following ...' The MOF then acted very properly and issued a letter dated 6 January 2020 to the CEO of LHDN and asked the latter to look into the matter (*untuk perhatian dan tindakan*).

[37] In the circumstances, it is quite obvious that there was a willingness on the part of LHDN to re-consider and they did re-consider and review the matter. No doubt, their decision (per letter dated 17 June 2020) was to maintain their earlier decision (29 August 2019) — revoking NKF's tax exempt status. Looking at all the circumstances, it cannot be said that LHDN's earlier decision dated 29 August 2019 is in fact the impugned decision. We agree with the submissions that were made by Counsel for NKF — that the impugned decision for purposes of judicial review is the one which was conveyed via LHDN's letter dated 17 June 2020, albeit that it was a reiteration of LHDN's earlier decision dated 29 August 2019 revoking the tax-exempt status. On that premise and applying the principle that was enunciated in *Per Ah Seng Robin*'s case, we concluded that the judicial review which was filed on 17 September 2020 was filed within three months as per O 53 r 3(6) of the Rules of Court 2012.

[38] But learned revenue counsel nevertheless argued that even if the LHDN letter dated 17 June 2020 is regarded as the impugned decision, the judicial review was filed out of time.

[39] We found no merit in the argument that the judicial review was filed out of time. As far as this part of the appeal is concerned, we take the view that the relevant provisions are O 3 r 2 of the Rules of Court 2012, O 53 r 3(6) of the Rules of Court 2012 and s 145 of the Income Tax Act 1967.

[40] Order 3 r 2 reads as follows:

> Order 3 Rules of Court 2012
>
> 2 Reckoning periods of time (O 3 r 2)
>
> (1) Any period of time fixed by these Rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.
>
> (2) Where an act is required to be done within a specified period after or from a specified date, *the period begins immediately after that date*.

A 3 *Leave* (O 53 r 3)

(1) ...

(2) ...

B (3) ...

(4) ...

(5) ...

(6) ...

C (7) The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

D **[41]** Order 53 r 3(6) Rules of Court 2012 provides that 'An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant'. Here the decision was communicated via LHDN's letter dated 17 June 2020. The question is — when was the impugned decision communicated to NKF? The answer lies in s 145 of the Act

E which reads as follows:

(1) Subject to any express provision of this Act, for the purposes of this Act notices may be served personally or by ordinary or registered post.

(2) *A notice relating to tax which is sent by ordinary or registered post shall be deemed to have been served on the person* (including a partnership) to whom it is addressed *on*

F *the day succeeding the day on which the notice would have been received in the ordinary course of post if it is addressed —*

(a) in the case of a company, partnership or body of persons having a registered office in Malaysia —

G (i) to that registered office;

(ii) to its last known address; or

(iii) to any person authorized by it to accept service of process:

(b) in the case of a company, partnership or body of persons not having a

H registered office in Malaysia —

(i) to any registered office of the company, partnership or body (wherever that office may be situated);

(ii) to the principal place of business or other activity of the company, partnership or body (wherever that place may be situated); or

I (iii) to any individual authorized (by or under the law of any place where the company, partnership or body is incorporated, registered or established) to accept service of process; and

(c) in the case of an individual, to his last known address.

(3) Where a person to whom there has been addressed a registered letter containing a notice under this Act — A

(a) is informed that there is a registered letter awaiting him at a post office but refuses or neglects to take delivery of the letter; or

(b) refuses to accept delivery of that registered letter when tendered, B

the notice shall be deemed to have been served upon him on the date on which he was informed that the letter was awaiting him or on which the letter was tendered to him, as the case may be.

(4) For the purposes of subsection (3) an affidavit by the officer in charge of a post office stating that to the best of his knowledge and belief — C

(a) there has been delivered to the address appearing on a registered letter a post office notification informing the addressee that there is a registered letter awaiting him; or

(b) there has been tendered for delivery to the addressee a registered letter, D

shall, until the contrary is proved, be evidence that the addressee has been so informed or that that registered letter has been tendered to him, as the case may be.

[42] In this case, the impugned decision is contained in LHDN's letter dated 17 June 2020. There is no evidence as to when NKF actually received the impugned decision. Hence, pursuant to s 145 of the Act, it is deemed that the letter would have been delivered on the day after the date of the letter, viz *18 June 2020*. As per O 3 r 2 of the Rules of Court 2012, the 'time period' of three months 'begins to run from the next day', ie *from 19 June 2020*. E F

[43] The next question is — how does one compute three months from 19 June 2020? In this regard, it is important to mention that in the Interpretation Acts 1948 And 1967 (Consolidated and Revised 1989) (Act 388), 'month' means a *month reckoned according to the Gregorian calendar.* What is 'month' according to the Gregorian calendar? The answer is provided by the case of *Migotti v Colvill* (1878) 4 CPD 233. G

[44] At p 238 of the judgment in *Migotti v Colvill*, Brett LJ enunciated that in computing time by calendar months per the *Gregorian* calendar, time must be reckoned by looking at the calendar and not by counting days; and that 'one calendar month's imprisonment is to be calculated from the day of imprisonment to *the day numerically corresponding to that day in the following month less one*'. This means three months is to be reckoned as the same numerical date at the end of three months, less one. Thus, three months from 19 June 2020 would be 19 September 2020, less one day 18 September 2020. H I

[45] Thus, following the said common law rule of interpretation, the last date to file for judicial review is *18 September 2020*. Here, judicial review was

filed on 17 September 2020, which is within the 3 months' time period for judicial review under O 53 r 3(6) of the Rules of Court 2012.

[46] For all the reasons discussed above, we are satisfied that this appeal is devoid of any merit. We affirmed the decision of the High Court and dismissed the appeal. Counsel for the respondent informed us that he is waiving costs as his client did not wish to seek costs against LHDN. Hence, we made no order as to costs.

[47] As the judicial review in the High Court had been stayed pending disposal of this appeal, we hereby order/direct the High Court to hear the judicial review expeditiously without any further delay as it has been four years since the judicial review was filed.

Appeal dismissed.

Reported by Ahmad Ismail